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April 23, 2020

VIA ELECTRONIC MAIL

Via FOIAonline (foiaonline.regulations.gov)

National FOIA Office
U.S. Environmental Protection Agency
1200 Pennsylvania Avenue, NW (2310A)
Washington, DC 20460

**Re: Expedited Freedom of Information Act Request: Proposed Rule and EPA Policy
Statement on the Treatment of Biogenic Carbon Dioxide Emissions**

Dear FOIA Officer:

Pursuant to the Freedom of Information Act ("FOIA"), 5 U.S.C. § 552, as amended, the Southern Environmental Law Center ("SELC") respectfully requests copies of the following records in the possession or control of the Environmental Protection Agency ("EPA") relating to the proposed rule entitled, "Treatment of Biogenic CO₂ Emissions Under the Clean Air Act Permitting Program," dated January 1, 2018, to present:

- (1) External, non-governmental communications related to the proposed rule;
- (2) Supporting data and analysis EPA relied on for the proposed rule;
- (3) Records relating to the purpose and need for the proposed rule;
- (4) Records relating to any political direction promoting the action;
- (5) Records relating to any coordination with other federal or state agencies;
- (6) Calendars or other records of meetings of political appointees related to the proposed rule; and
- (7) Records relating to EPA's Science Advisory Board regarding the proposed rule, including but not limited to, any records responding to the 2012 and 2019 reports by the Science Advisory Board on biogenic carbon emissions.

SELC also requests the following records in the possession and control of EPA relating to the April 2018 policy statement entitled, “EPA’s Treatment of Biogenic Carbon Dioxide (CO₂) Emissions from Stationary Sources that Use Forest Biomass for Energy Production,” dated February 1, 2017, to present:

- (1) The “draft EPA analysis” noted in EPA’s April 2018 policy statement as “suggest[ing] that use of various biomass feedstocks for energy at stationary sources can result in negligible net contribution to atmospheric concentrations of CO₂ depending on factors related to feedstock characteristics, production and consumption, and alternative uses;” and
- (2) Any records related to the relationship between EPA’s April 2018 policy statement and the proposed rule on the treatment of biogenic CO₂ emissions, referenced above.

For purposes of this request, the term “records” includes all written, printed, recorded, or electronic materials, communications, correspondence, memoranda, notations, copies, diagrams, charts, books, papers, maps, photographs, data, tables, spreadsheets, formulas, directives, observations, impressions, contracts, letters, messages, and mail in the possession, custody, or control of EPA or its agents. Please provide any electronic records in native file format.

In addition, we request access to each and every version of a record or document, whether it is a draft, has been electronically deleted, has attachments, bears annotations, etc. Please also include all responsive records generated up to the date of the agency’s search for records responsive to this request.

Fee Waiver Request

We request that EPA waive any search and duplication fees and provide the requested records without charge, or at a reduced charge, pursuant to 5 U.S.C. § 552(a)(4)(A)(iii). A fee waiver is appropriate because disclosure would be in the public interest. Disclosure is in the public interest if: (1) it is likely to contribute significantly to public understanding of the operations or activities of the government, and (2) it is not primarily in the commercial interest of the requester. The public interest standard of the fee waiver provision of FOIA should be “liberally construed” in favor of waivers. *McClellan Ecological Seepage Situation v. Carlucci*, 835 F.2d 1282, 1284 (9th Cir. 1987); *Pederson v. Resolution Trust Corp.*, 847 F. Supp. 851, 855 (D. Colo. 1994); *Etlinger v. FBI*, 596 F. Supp. 867, 972 (D. Mass. 1984). The goal of the statute is to avoid the “rollbacks and technicalities which have been used by various Federal agencies to deny waivers . . .” *Pederson*, 847 F. Supp. at 855.

In determining whether the first prong of the public interest test is met, four factors are considered: First, “[t]he subject of the requested records must concern identifiable operations or activities of the Federal government, with a connection that is direct and clear, not remote.” 40 C.F.R. § 2.107(1)(2)(i). Second, the information contained in the records must be “‘likely to contribute’ to an understanding of government operations or activities,” which is judged by whether the records will “be meaningfully informative about government operations or activities.” 40 C.F.R. § 2.107(1)(2)(ii). Third, the requested information “must contribute to the

understanding of a reasonably broad audience of persons interested in the subject.” 40 C.F.R. § 2.107(1)(2)(iii). And finally, the disclosure must be “likely to contribute ‘significantly’ to public understanding.” 40 C.F.R. § 2.107(1)(2)(iv).

Disclosure of the requested records and the fee waiver or reduction would be in the public interest because these records clearly and directly concern operations or activities of the Federal government and will contribute significantly to the public understanding of EPA’s activities in relation to the proposed rule on the treatment of biogenic carbon dioxide emissions and EPA’s April 2018 policy statement on the same topic. SELC is a 501(c)(3) non-profit organization working to protect the natural resources of the Southeast and, in particular, to gather, analyze, and disseminate public information about matters of conservation and environmental protection. As part of its work, SELC has been actively engaged in disseminating information about the use of woody biomass for energy production, including as it relates to the wood pellet and biomass industries’ impacts on climate change and carbon dioxide emissions, local air pollution, and forests and other natural areas. SELC has disseminated this information to a broad audience of interested parties, including local, regional, national, and international non-profits; domestic and international policy makers; and communities and individuals directly impacted by the industry. More information about SELC’s efforts can be found at, <https://www.southernenvironment.org/cases-and-projects/biomass-energy-in-the-south>. SELC intends to disseminate the information gathered through this request to the general public through press releases, social media, public comment letters, and its website, [southernenvironment.org](https://www.southernenvironment.org), which is updated regularly.

The second prong in whether a fee waiver is in the public interest is whether the request is primarily in the commercial interest of the requester. 40 C.F.R. § 2.107(1)(2)(i). A request would be within the commercial interest of the requester if the requester is “seek[ing] information for a use or purpose that furthers his/her commercial, trade, or profit interests.” 40 C.F.R. § 2.107(b)(1). As noted above, SELC is a 501(c)(3) non-profit organization dedicated to protecting the environment of the Southeast. It does not have commercial, trade, or profit interests in seeking these disclosures. SELC’s intended use of the requested materials is to glean a greater understanding of EPA’s plans for the treatment of biogenic carbon dioxide emissions and to continue to disseminate information about this topic to the public through the many channels described above. All of the activities described above have been, and will continue to be, provided to the public by SELC and our clients for no payment.

Should SELC’s request for reduced or waived fees be denied, SELC is prepared to bear the reasonable duplication and search costs necessary to fulfill this request. However, I request you contact me before processing this request if the fee is expected to be in excess of \$100.00. SELC reserves its right to appeal a fee waiver or reduction denial.

Expedited Processing Request

We seek expedited processing of this request pursuant to 5 U.S.C. § 552(a)(6)(E), 40 C.F.R. § 2.104(f). We therefore ask that EPA take the request out of order and give it expedited treatment. FOIA provides that each agency shall provide for expedited processing of records requests “in cases in which the person requesting the records demonstrates a compelling need.” 5

U.S.C. § 552(a)(6)(E)(i)-(ii). SELC has an urgent and compelling need for expedited processing of this request because EPA has already begun the formal rulemaking process for this proposed rule and initiation of the notice and comment period may occur at any time.

The purpose of notice and comment rulemaking is to provide for “meaningful public participation in the rule-making process.” *Idaho Farm Bureau Fed. v. Babbitt*, 58 F.3d 1392, 1404 (9th Cir. 1995). Such meaningful participation can only occur “if the public is able to make intelligent, informed, meaningful comments.” *Washington Trollers Ass’n v. Kreps*, 645 2d 684, 686 (9th Cir. 1981). Without expedited and prioritized processing of this request, SELC may not receive relevant documents until after the notice and comment period for the proposed rule has passed. This will prevent SELC and the public from fully understanding and responding to EPA’s proposed rule. As a result, SELC and the public will be deprived of the opportunity to fully and meaningfully participate in the rulemaking process, in violation of Congress’s well-established goals in passing the Administrative Procedure Act. *See U.S. v. Nova Scotia Food Products Corp.*, 568 F.2d 240, 252 (2d Cir. 1977) (“To suppress meaningful comment by failure to disclose the basic data relied upon is akin to rejecting comment altogether. For unless there is common ground, the comments are unlikely to be of a quality that might impress a careful agency. The inadequacy of comment in turn leads in the direction of arbitrary decision-making.”).

Full and meaningful participation is particularly important for the ongoing rulemaking as EPA is proposing an entirely new method for regulating biogenic carbon dioxide emissions under the Clean Air Act. This rule will set, for the first time, EPA’s official position regarding the carbon emissions associated with burning bioenergy, which directly implicates Clean Air Act permitting, but will also implicate climate and carbon reduction policies at the regional, national, and international level. Based on EPA’s prior policy statement, upon which the proposed rule is being based, EPA’s treatment of biogenic carbon emissions will likely contradict previous findings by the agency’s own Science Advisory Board as well as hundreds of scientists that have addressed this issue. Understanding EPA’s rationale and support for its proposed treatment of biogenic carbon emissions is therefore important for a full and complete response to the proposed rule.

As discussed more fully above, one of SELC’s primary purposes for this request is to disseminate information relating to EPA’s past policy and ongoing rulemaking regarding its treatment of biogenic carbon dioxide emissions. The need for expedited review is therefore both urgent and made primarily for the purpose of dissemination. *See* 40 C.F.R. § 2.104(f)(1)(ii).

Within ten calendar days of receipt of a request for expedited processing, EPA is required to decide whether to grant the request and shall notify the requester of the decision. 40 C.F.R. § 2.104(f)(4). If a request for expedited treatment is granted, the request shall be given priority and shall be processed as soon as practicable. *Id.* If EPA denies the request for expedited processing, then EPA must make a “determination” on the request within twenty working days of receipt. 5 U.S.C. § 552(a)(6)(A)(i). The statute favors disclosure of records and instructs the agency to withhold information only in narrowly defined circumstances in which the agency can articulate a reasonably foreseeable harm protected by an exemption. *See id.* § 522(a)(8)(A)(i). FOIA also requires the release of all reasonably segregable portions of a document that are themselves not

exempt. *See id.* § 552(b). Should EPA refuse to provide the information requested, EPA must inform SELC of the grounds for its refusal and the specific administrative appeal rights which are available. *See id.* § 552(a)(6)(A)(i).

SELC further requests preparation of a *Vaughn* index to facilitate evaluation of the completeness of EPA's response. *See Vaughn v. Rosen*, 484 F.2d 820 (D.C. Cir. 1973) (index should include a detailed justification for claims of exemption, as well as specificity, separation, and indexing of documents). SELC requests that this index include the date of the document, the authors and recipients, the subject matter of the document, and the basis for the claimed privilege or exemption for disclosure. Further, where a document contains specific information that you claim is exempt or privileged, we request that you simply redact the information so claimed and produce the document in redacted form. The redacted information should be included in the list of privileged or exempt information just described.

This statement is made and certified to be true and correct to the best of my knowledge and belief pursuant to 40 C.F.R. § 2.104(f)(3).

Thank you for your prompt attention to this matter. Because the volume of records responsive to our request may be large, we are willing to work with your agency to minimize the work necessary to respond. We are available to review documents prior to any duplication and are willing to discuss other ways to facilitate the production of the requested public records, for instance, by narrowing our request if necessary. Please do not hesitate to contact me at 919-967-1450 or hhillaker@selcnc.org to arrange for inspection, copying, and electronic transmission of the requested public records.

Sincerely,

A handwritten signature in dark ink, appearing to read "Heather Hillaker", written in a cursive style.

Heather Hillaker
Associate Attorney